Cogburn Healthcare Center, Inc. *and* United Food Commercial Workers Union, Local 1657, AFL–CIO

Toni M. Hill *and* Medforce, A Division of MJP, Inc. Party in Interest. Cases 15–CA–13874, 15–CA–13885, 15–CA–13949, 15–CA–13974, 15–CA–14029, 15–CA–14069–1, 15–CA–14069–2, and 15–RC–7988

June 21, 2004

ORDER DENYING MOTION

BY MEMBERS LIEBMAN, SCHAUMBER, AND WALSH

On September 27, 2001, the National Labor Relations Board issued a Decision and Order in this proceeding[1] finding, inter alia, that a *Gissel*[2] bargaining order was appropriate to remedy the Respondent's widespread unfair labor practice violations.

Thereafter, on November 2, 2001, the Respondent timely filed a request to reopen the record and for reconsideration (motion).[3] The Respondent, in its motion, argues that changes in management and composition of the bargaining unit, as well as the passage of time, make the Board's *Gissel* order unnecessary and unenforceable. The Respondent urges the Board to reopen the record and reconsider its decision in this case. The General Counsel filed an opposition to the Respondent's motion.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Having duly considered the matter, we deny the Respondent's request to reopen the record and for reconsideration as lacking in merit for the reasons stated below.

In its earlier decision, the Board found that the Respondent engaged in widespread 8(a)(1) violations, violated Section 8(a)(3) by discharging five employees, and violated Section 8(a)(3) and (4) by discharging another employee, and that the Respondent's unfair labor practices warranted the issuance of a bargaining order. Regarding the judge's recommendation of a bargaining order, the Board specifically concluded that the Respondent's serious unfair labor practices had a direct impact on a significant portion of the approximately 135 employees in the bargaining unit. The Board noted that the Respondent did not claim that a *Gissel* order was unwarranted because of either passage of time or intervening changed circumstances.

The Respondent asserts in its motion that a *Gissel* bargaining order is not appropriate in this case because more than 5 years passed from the July 1996 Board election among the unit employees and the Board's 2001 decision in this case, no other unfair labor practice charges have been filed against the Respondent since the complaint issued, and there has been extensive turnover among management and the unit employees. Regarding employee turnover, the Respondent avers that the bargaining unit presently consists of 169 employees and that only 44 percent of them were employed during the Union's 1996 organizing campaign. The Respondent contends that of the 82 employees who signed authorization cards supporting the Union's claim of majority status only 25 card signers remain in its employ. Further, the Respondent asserts that Co-owner Steve Roberts, to whom the Board attributed at least nine violations, is deceased; that former Administrator Suzanne Hughes, whom the Board found committed five violations, no longer works for the Respondent; that Supervisor Joan Branning, to whom the Board attributed six violations, has left the Respondent's employment; and that Dietary Manager Sonya O'Shea recently returned to the Respondent after an absence of more than 2 years during which she worked for a unionized employer and had no unfair labor practice charges or grievances filed against her.

The Respondent claims that: "[I]t is incredible that the Board would expect an employer to argue that a *Gissel* order was not warranted because of passage of time" before the Board's bargaining order even issued. The Respondent further asserts, citing, e.g., *Flamingo Hilton-Laughlin v. NLRB*, 148 F.3d 1166, 1171 (D.C. Cir. 1998); *Charlotte Amphitheater Corp. v. NLRB*, 82 F.3d 1074, 1078 (D.C. Cir. 1996), that such a remedy, in any event, is unenforceable in the circuit courts due to the passage of time and the employee and management turnover that has occurred.

1. We conclude that the Respondent's motion is deficient because it fails to state, as required by Section 102.48(d)(1) of the Board's Rules and Regulations, "why [the evidence] was not presented previously." Although the Respondent claims that evidence of posthearing employee and management turnover, as well as the absence of any new unfair labor practice charges filed against it, demonstrate that a bargaining order is no longer warranted in this case, the Respondent has failed to state why it neglected to proffer this evidence until after the Board issued its decision. The Respondent's explanation that "Cogburn cannot be expected to have presented evidence of substantial employee turnover and management

[1] 335 NLRB 1397 (2001).

[2] *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

[3] Although the Board initially rejected the Respondent's request to reopen as untimely, the Board reconsidered that determination and accepted Respondent's submission.

changes which did not exist when this matter initially was presented to the Board" begs the question. The judge's decision, including a recommended bargaining order, issued on June 4, 1998, and the Board's Decision and Order issued on September 27, 2001. The Respondent has failed to show that some or all of this evidence it now relies on was not available during the period that the case was pending before the Board on exceptions. In fact, the only changed circumstance for which the Respondent provides a date—the replacement of Suzanne Hughes as administrator by Michelle Newt—took place in 1998. Thus, the Respondent has made no effort to show that it "promptly" moved to reopen the record, as required by Section 102.48(d)(1) of the Board's Rules. Accordingly, we find that the Respondent's motion was untimely made.

In reaching this conclusion, we stress that the Court of Appeals for the District of Columbia Circuit made clear in *Charlotte Amphitheater Corp.*,[4] supra, that the burden is on a respondent to bring to the Board's attention any evidence of changed circumstances that would render a *Gissel* order inappropriate. Although the court found that the employer's motion was timely because it was filed "with reasonable promptness following the issuance of the ALJ's recommendation of a bargaining order," the court stated that "the Board has no affirmative duty to inquire whether employee turnover or the passage of time has attenuated the effects of earlier unfair labor practices."[5] Furthermore, the Fifth Circuit in *NLRB v. U.S.A. Polymer Corp.*,[6] in approving a bargaining order based on unfair labor practices that were about 7 years old, criticized the employer there for waiting until the Board's decision providing for this remedy issued before it attempted to introduce evidence of changed circumstances.[7]

2. Section 102.48(d)(1) of the Board's Rules and Regulations further provides that a motion to reopen the record must state why the additional evidence, if adduced and credited, "would require a different result." Although the Respondent has recited changed circumstances as grounds for rescinding the *Gissel* order, the Board's established policy is to assess the propriety of a bargaining order as of the time that the respondent committed the violations.[8] We therefore conclude that the Respondent's motion does not comply with the Board's Rules.

Furthermore, regarding the Respondent's assertion of management turnover, we note that the Respondent's chief financial officer, Prentice Smith, was also serving as the acting administrator at the Cogburn facility when the Respondent filed its motion on November 2, 2001. The Board found in the underlying decision that Smith violated Section 8(a)(1) of the Act by interrogating an employee and by telling employees during a mock bargaining session that the Respondent did not have to bargain in good faith. Further, the Respondent unlawfully discharged employee Toni Hill the day after she protested that Smith was not bargaining in good faith during the mock bargaining session and again caused her unlawful discharge when she later went to work at another of its facilities while employed by an employment agency providing temporary employees. The Respondent also avers that it has recently rehired Dietary Manager Sonya O'Shea who had been employed by another health care provider for more than 2 years. In the underlying case, O'Shea violated the Act by interrogating three employees and by threatening that the Respondent would sell the facility and that it would not rehire any striking employees. Thus, even considering the Respondent's changed circumstances, the present hierarchy includes individuals who have been found to have violated the Act. We also note that the Respondent does not contend that there has been any significant change in the family ownership group, which ultimately directs this health care operation, other than the death of Steve Roberts.[9]

3. We further conclude, contrary to the Respondent and our dissenting colleague, that passage of time does not render a bargaining order inappropriate because, as the Board stated in its earlier decision:

> The passage of time between the Union's election campaign and our decision today, though regrettable, does not detract from the necessity for restoring the status quo ante regarding the employees' desires for union representation that the Respondent dissipated through unfair labor practices.

335 NLRB at 1401.

We therefore conclude that the additional evidence the Respondent seeks to introduce in this case does not require a different result.

[4] 82 F.3d at 1080.

[5] Id.

[6] 272 F.3d 289, 296 (2001), cert. denied 536 U.S. 939 (2002).

[7] See also *Dunkin' Donuts Mid-Atlantic Distribution Center*, 363 F.3d 437, 441 (D.C. Cir. 2004) (court noted that employer did not move to reopen record to place before Board evidence of changes in management that occurred 21 months before Board's order).

[8] See, e.g., *Salvation Army Residence*, 293 NLRB 944, 945 (1989), enfd. mem. 923 F.2d 846 (2d Cir. 1990).

[9] Respondent's claim of employee turnover also has no merit. See *Dunkin' Donuts Mid-Atlantic Distribution Center*, supra at fn. 7 (court stressed that, despite turnover, "a core" of employees remained who had experienced employer's unlawful conduct). Even accepting the Respondent's numerical assertions, a core of the original work force remains.

4. Finally, in its underlying decision, the Board provided an extensive analysis of the inadequacy of traditional remedies. The Board analyzed the seriousness of the unfair labor practices, their widespread impact throughout the bargaining unit, the evidence that high-ranking officials had committed some of them, and the "hallmark" violations the Respondent committed in threatening to sell the facility, to eliminate benefits, and not to rehire strikers and in discharging six employees. 335 NLRB at 1399–1401.

In short, "[t]here must be an end to litigation in Labor Board cases."[10] We do not believe, for the reasons stated above, that the relevant circuit courts have contemplated that a belated request for further hearing would be sufficient to warrant prolonging this administrative proceeding in view of the prejudicial effects of delay. We therefore deny the Respondent's motion to reopen the record.

IT IS ORDERED that the Respondent's request to reopen the record and for reconsideration is denied.

Dated, Washington, D.C. June 21, 2004

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[10] *L'Eggs Products, Inc., v. NLRB*, 619 F.2d 1337, 1353 (9th Cir. 1980).

MEMBER SCHAUMBER, dissenting.

Contrary to the majority, I would rescind the *Gissel*[1] bargaining order that the Board issued in this case[2] based on the substantial passage of time between the 1996 election held in the representation case and the Board's 2001 decision. Federal circuit courts repeatedly have chastised the Board in no uncertain terms for failing to assess the appropriateness of a *Gissel* bargaining order in light of changed circumstances as of the date the order is entered.[3] Moreover, the Board itself has recognized that an excessively long delay of proceedings before the Board, such as occurred here, would likely render a bargaining order unenforceable.[4] Consequently, further litigation and delay over the propriety of a bargaining order would not serve the interests of the unit employees. In these circumstances, I conclude that a new election is the best method to allow these employees to exercise their Section 7 right to engage in or refrain from union activities.

Dated, Washington, D.C June 21, 2004

Peter C. Schaumber, Member

NATIONAL LABOR RELATIONS BOARD

[1] *NLRB v. Gissel Packing Co.*, 393 U.S. 575 (1969).

[2] I was not a member of the Board when this case issued at 335 NLRB 1397 (2001), and express no view on the merits.

[3] See, e.g., *Charlotte Amphitheater Corp. v. NLRB*, 82 F.3d 1074, 1078 (D. C. Cir. 1996), and cases cited therein.

[4] *Cooper Hand Tools*, 328 NLRB 145, 146 (1999); *Wallace International de Puerto Rico*, 328 NLRB 29 (1999).